

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**THE CLOSET FACTORY, INC.,  
Employer**

**and**

**Case No. 29-RC-11625**

**LOCAL 2090, NEW YORK DISTRICT COUNCIL  
OF CARPENTERS, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,  
Petitioner**

*Raul Garcia, Esq., (O'Dwyer & Bernstein, LLP)*  
for the Petitioner

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(Epstein Becker & Green, P.C.)* for the  
Employer

**RECOMMENDED DECISION ON OBJECTIONS**

**STEVEN DAVIS, Administrative Law Judge:** Upon a petition filed on July 17, 2008<sup>1</sup> by Local 2090, New York District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Petitioner or Union) and pursuant to a Stipulated Election Agreement, an election was held on August 28 in the following unit:

All full-time and regular part-time shop employees, drivers, and installers employed by the employer at its facility located at 32-45 Hunters Point Avenue, Long Island City, New York, but excluding all draftsmen, designers, office clerical employees, managers, guards and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots showed that of approximately 13 eligible voters, 8 cast votes for the Petitioner, 4 cast votes against the Petitioner, and there were no challenged ballots. The Closet Factory, Inc. (Employer) filed 13 timely objections to conduct affecting the results of the election.

On October 1, the Acting Regional Director issued a Report on Objections and Notice of Hearing in which he recommended that Objections 7 and 9 be overruled and that a hearing be held on Objections 1 through 6, 8, and 10 through 13. No exceptions were filed to the Report, and on November 14, the Board adopted the Acting Director's recommendations.

The objections before me are as follows:

1. Local 2090, New York District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and its affiliates, agents, representatives, and/or supporters ("Union"), through its designated election observer, Luis Ruiz, improperly interfered with the fair operation of the election process and

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<sup>1</sup> All dates herein are in 2008 unless otherwise stated.

destroyed the laboratory conditions by providing instruction to voters in Spanish after the voters reviewed the ballots from the Board Agent supervising the election and before the eligible voters marked their ballots or deposited their marked ballots in the ballot box.<sup>2</sup>

2. The Union, through its designated election observer, Luis Ruiz, improperly interfered with the fair operation of the election process and destroyed the laboratory conditions by speaking to voters in Spanish while they were preparing to vote and while they voted.
3. The NLRB, through its Board Agent, interfered with the fair operation of the election process and failed to secure the minimum laboratory conditions by failing to direct the Union's designated election observer, Luis Ruiz, to stop speaking to voters in Spanish while they were voting as required by NLRB Casehandling Manual Part Two, Representation Proceedings Section 11318.2(a) "prohibition of observers electioneering and unnecessary conversation with voters" and Section 11326.2 "observers not permitted to engage in unnecessary conversation with incoming voters." Neither the Board Agent, nor the Employer's observer, speak or understand Spanish.
4. The NLRB, through its Board Agent, interfered with the fair operation of the election process by failing to properly instruct the Union's designated election observer, Luis Ruiz, that he is prohibited from engaging in conversations with voters and by failing to ensure that he understood the instructions as required by NLRB Form 722, attached hereto as Exhibit A.
5. The NLRB, through its Board Agent, interfered with the fair operation of the election process and failed to secure the minimum laboratory conditions by failing to stop voters from speaking to the Union's designated election observer, Luis Ruiz, in Spanish while they were voting or preparing to vote.
6. Juan Valez, a Section 2(11) supervisor, solicited and obtained authorization cards for the Union and actively campaigned on behalf of the Union.
8. The Union, through its officers, agents and employees and through Juan Valez, a Section 2(11) supervisor, unlawfully threatened, coerced and restrained those employees who did not support the Union by, among other things, slowing down work orders so that installers who did not support the Union could not complete their jobs in a timely fashion.

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<sup>2</sup> This Objection states that Ruiz spoke to the voters after they "reviewed" the ballots from the Board agent. The word should probably be "received." However, since the voter would have reviewed the ballot after he received it, the discrepancy is irrelevant.

10. The Union by conducting its campaign through a Section 2(11) supervisor, created the false impression that Company officials supported the Union.

11. The Union and Juan Valez, a Section 2(11) supervisor, unlawfully threatened that both the Union and the Employer would retaliate against those employees who failed to support the Union.

12. The Union, by and through its agents, organizers, representatives and supporters, including, but not limited to, Walter Clayton, destroyed the laboratory conditions necessary for a free and fair election by offering and granting Closet Factory employees valuable benefits in exchange for their support of the Union in the above-referenced representation election.

13. The Union offered Closet Factory employees membership in the Carpenters' apprentice program in exchange for support of the Union in its ongoing campaign at a time when the Union stated on its website that it was no longer taking applications for apprentice classes. The Union apprenticeship training program is a tangible benefit and it is perceived by persons in the industry, including the eligible voters in the election herein, to be valuable to employees in their careers. By so doing, the Union offered and/or granted a benefit, the promise or granting of, which had the effect of interfering with the employees' freedom of choice.

A hearing was held before me in New York, NY, on October 14, November 12, 14, and December 1.<sup>3</sup> Based on the record and my observation of the demeanor of the witnesses and the briefs filed by both parties, I make the following Recommended Decision.

### Findings of Fact

#### The Employer's Operation

The Employer manufactures custom made closets and has its headquarters in Los Angeles, California. The company is headed by its president, Gregory Stein. Other headquarters' officials include Jeannie Nicodemus, the vice president of operations and vice president Catherine LaBarbera.

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<sup>3</sup> On the last day of the hearing the Union requested and received a postponement to consider whether to present evidence concerning Employer's Exhibit 8, received in evidence that day. That exhibit is a copy taken from the Union's website concerning its apprenticeship program. Subsequently, the Union advised that it did not wish to present such evidence and an Order Closing Hearing was issued on December 16.

The Employer operates at least two factories in New York, one in Hicksville, Long Island, and one, the site of this matter, in Long Island City, Queens (herein called factory or plant). The following personnel constitute the admitted supervisory hierarchy of the factory at around the time of the election:

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- Branch manager – James Schlan from April, 2006 to March, 2008, and Doreen O'Mally until July, 2008.
- Operations Manager - Bautista Castillo until April, 2008 when he became the Branch Manager.
- Operations Manager – Eusi Fraser from April, 2008.
- Manager of Customer Relations and Service - Bill Urspruch.

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Sales are generated by advertisements to which prospective customers respond. Designers visit the customer's home and prepare a design for the customer's approval. Once the design is approved, the closet and its components are manufactured in the factory by the production employees and their helpers. When the production is completed the closet is installed by installers and their helpers.

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### **I. Objections 1-5**

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Essentially these objections allege that the Union's election observer, Luis Ruiz, interfered with the election by (a) providing instructions in Spanish to voters after the voters received their ballots from the Board agent and before they marked their ballots (b) speaking to voters in Spanish while they were preparing to vote and while they voted and (c) the Board agent's failing to direct Ruiz to stop speaking to voters, failing to tell him that he is prohibited from engaging in conversations with voters, and failing to stop voters from speaking to Ruiz.

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### **A. The Facts**

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Kizzy-Ann Kimberly Antoine, the Employer's observer, testified that Annie Hsu, the Board agent, arrived at the voting area at about 6:50 a.m. for the 7:00 a.m. scheduled start of the election. Hsu gave Antoine and Ruiz the Board's "Instructions to Election Observers" and asked them to read it. She then prepared the ballot box and asked the two observers if they read the form. They both said they did and Hsu asked if they had any questions. Neither observer asked any questions.

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The form sets forth the "principal functions" of the observer, as relevant here, as monitoring the election process, helping to identify voters and "assist the Board Agent in the conduct of the election." Included among the observer's duties are identifying voters, checking off the name of the person seeking to vote, and reporting any unusual activity to the Board agent. The form advises the observer not to "talk to any voter waiting in line to vote, except as instructed by the Board agent (greeting voters as they approach to vote is acceptable)," and states that the observer must not electioneer at any place during the election or discuss or argue about the election or "give any help to any voter. Only a Board Agent can assist the voter."

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Hsu showed the observers a list of the employees who were eligible to vote, and told them that when the voters entered the room they would state their name and once they recognized the voter, they should each place a check mark next to their name on the list. During the election the two observers sat next to each other with their backs to the ballot box. The observers sat at an angle so that they could observe the voters as they placed their ballots in the ballot box. Hsu sat opposite the observers and faced the ballot box.

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Antoine testified that Ruiz had “conversations” with at least five to seven voters in Spanish, specifically identifying voters Elvin Ayala, Radhames Herrera, and Victor Madera as those he spoke to. She stated that Ruiz spoke to them when they were being given instructions by Hsu, and after they received their ballot while walking to the voting booth. He also made gestures in the direction of the ballot box and voting area. Antoine does not understand Spanish and therefore did not know what was said. She noted that whenever a voter entered the room, Ruiz was “very friendly and greeted everyone.” She further stated that in “most cases” when Hsu began to give the voter instructions as to how to mark the ballot Ruiz would “automatically cut her off” speaking in Spanish to the voter. She noted that occasionally his conversation was very short, but at times he spoke to voters such as Ayala, Herrera and Madera for at least 20 to 30 seconds and they responded to him. Antoine noted that Hsu did not stop Ruiz from speaking to voters and said nothing to him about his conduct.

Antoine added that Ruiz greeted, in English, one or two employees who only speak English, and they greeted him. Those conversations lasted only two seconds whereas the conversations in Spanish lasted 15 to 30 seconds. During the election Hsu noticed that a manager was sitting in his office close to the voting area and asked him to vacate his office during the election. Antoine noted that she had a duty to report any unusual activity to Hsu, but she did not report Ruiz’ actions because she believed that it was Hsu’s responsibility to ensure that a fair vote took place.

Ruiz first testified that neither Hsu nor Antoine asked the voters for their names when they approached his table, but then contradicted himself stating that both women asked the voters for their names.

Ruiz stated that he greeted the voters in Spanish and English – “hello, how are you doing, good morning” and then asked for their names so that he could check their names on the list. He did so because, although he knew some of the voters he did not know most of them since he did not know their last names. He denied interrupting Hsu, speaking to voters after they were given a ballot, telling voters how to vote or to vote for the Union, and also denied saying anything more than a greeting and asking for their names. He specifically denied speaking to voters for as long as 20 to 30 seconds as testified by Antoine.

Ruiz conceded reading the list of instructions and being asked by Hsu if he did not understand them. He noted that the instruction form mentioned that the observer could greet the voters but not speak to them. Ruiz conceded speaking to Ayala and Radhames Herrera<sup>4</sup> and perhaps others, but only asked them their names.

Employee Madera testified that Hsu instructed him as to the voting procedure, denying that Ruiz interrupted her instructions. Madera, Ayala and Herrera stated that Ruiz asked them in Spanish for their names and said nothing else to them. They denied that Ruiz intimidated them during the election, or told them to vote either for the Union or the Employer, and nothing he said caused them to change their minds as to how they would vote. Madera and Ayala believed that Hsu was in charge of the election. Ayala stated that his conversation with Ruiz took less than 20 seconds. Herrera denied that Ruiz spoke to him after he received a ballot.

The Employer requested that Board Agent Hsu testify at the hearing pursuant to subpoena. On October 9, Board Associate General Counsel Richard Siegel denied the request

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<sup>4</sup> Referred to as Ramirez in the transcript.

on the ground that other witnesses were available to testify as to the events in question. Apparently pursuant to a request by Regional Director Alvin Blyer that Hsu be permitted to testify, on November 14, Siegel wrote to Blyer that apparently because of conflicting testimony regarding the content and the length of the conversation between Ruiz and a voter, she could  
 5 testify regarding the length of the conversation but not its content because Hsu does not speak Spanish. Siegel noted that notwithstanding the Board['s] policy against Agency employees appearing as witnesses in Agency proceedings, but based on the particular circumstances presented and in order to have a complete record, permission was given to Hsu to testify "solely  
 10 about her inability to understand the content of the conversation between the Petitioner's observer and the voter and the duration of this conversation."

Accordingly, Hsu gave limited testimony. Both parties objected to the restrictions placed by Siegel on her testimony and numerous objections were made by counsel to the Regional  
 15 Office to questions asked by both parties which went beyond the strict limitations imposed by Siegel.

Hsu testified that she did not understand Spanish and did not know what was said between Ruiz and the voters. She stated that she heard words spoken between Ruiz and a  
 20 "few" voters in Spanish for 10 to 30 seconds. The voters' response was "very short" – 5 to 10 seconds. She did not recall if Ruiz spoke English to any voters, but he did not speak in Spanish to all the voters. She did not know the names of the voters he spoke to, and did not recall any of the words he said to the voters. Although she testified that she does not speak Spanish, she knows the Spanish words for "hello, how are you," but could not recall whether those words  
 25 were spoken by Ruiz. Hsu could not recall if Ruiz spoke to any voters in Spanish after she gave the voter a ballot.

### B. Analysis

First, it is clear that Ruiz, acting as the Union's observer, was its agent, and his conduct  
 30 is attributable to the Union. *Detroit East, Inc.*, 349 NLRB 935, 936 (2007) citing *Brinks Inc.*, 331 NLRB 46 (2000).

In *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-1119 (1982), the Board set  
 35 forth certain rules to evaluate alleged impermissible electioneering which occurs at or near the polls:

When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances,  
 40 "is sufficient to warrant an inference that it interfered with the free choice of voters." This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on  
 45 whether the electioneering is conducted within a designated "no electioneering" area or contrary to the instructions of the Board agent.

The first determination is whether impermissible electioneering occurred. The only  
 50 evidence as to what was actually said between Ruiz and the voters is the testimony of Ruiz and the persons he spoke to. Neither of the two non-voter witnesses, Antoine or Board agent Hsu, understood Spanish.

First, neither the testimony of Antoine or Board agent Hsu establishes that Ruiz engaged in any impermissible electioneering. Neither witness knew what he was saying to the voters in Spanish or what they were saying to him. The most that could be established from their testimony was that Ruiz had 15 to 30 second conversations with at least five to seven voters, and that such conversations continued after they received a ballot. Antoine conceded, however that Ruiz “greeted” the English-speaking voters in English.

Ruiz conceded greeting the voters in Spanish and English. Similarly, in *Dubovsky & Sons, Inc.*, 324 NLRB 1068, 1069 (1997), the union observer’s response “fine” to a voter’s question as to how he was doing, and his 10 to 20 second whispered response to a 30 to 40 second question from a voter were deemed to be non-objectionable. The Board noted that they were not “sustained” conversations prohibited by *Milchem*, 170 NLRB 362 (1968) and the first remark was deemed to be “no more than the type of “social pleasantry” that the Board has declined to find to be objectionable electioneering, whether initiated by the observer or by the voter.

*Milchem*, cited by the Employer, is inapplicable. It involved a union official’s speaking for five minutes to about 15 employees waiting to vote. The Board, prohibiting “prolonged conversations” between representatives of the parties and voters waiting to cast their ballots, overturned the results of the election. However, the Board noted that “chance, isolated, innocuous comment or inquiry” by a party to a voter will not necessarily void the election. 170 NLRB at 363. Objectionably “prolonged” conversations include those which are five to ten minutes long. *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1338 (2004). In contrast, in *Sir Francis Drake Hotel*, 330 NLRB 638 (2000), where the observer spoke to 5 or 6 voters of the approximately 100 voters for a few seconds to one minute, and where the content of the conversations was innocuous, the Board held that improper electioneering did not occur, even where the observer disregarded the Board agent’s admonitions not to talk to voters. Similarly, in *Bonanza Aluminum Corp.*, 300 NLRB 584, 584 (1990), the Board found that a two minute conversation between an observer and a voter, the substance of which was not known, was not prolonged or sustained within the meaning of *Milchem*.

In *Amal. Serv. & Allied Ind. Joint Bd. V. NLRB*, 815 F.2<sup>nd</sup> 225, 229-231 (2<sup>nd</sup> Cir. 1987), a case similar to the instant case, a union observer had three conversations in Spanish with one voter for about 30 seconds, then another for about 30 seconds, and later, with a group of three or four voters for about 90 seconds. The employer observer did not understand Spanish, the content of the conversations was not known, and the Board agent did not stop the conversations. The employer argued that the cumulative length of all the conversations which took place while about 17 employees waited to vote was sufficient to void the election under *Milchem*. The Board refused to set aside the election because the observer’s conversations were brief and isolated, and the court agreed. The court, although noting that it would “have been better had the Board agent prevented the challenged conversations... the failure of a Board agent to prevent all misconduct does not automatically warrant setting aside an election,” and that the agent’s failure to stop the observer from speaking to voters “did not impugn the integrity of the election.” 815 F.2<sup>nd</sup> at 231.

In *Deeco, Inc.*, 116 NLRB 990, 991 (1956), a union observer translated the Board agent’s instructions to voters who did not understand English. The Board found that such conduct was not objectionable since there was no evidence that the observer engaged in electioneering during his conversations in Spanish with a number of voters.

Ruiz and two voters testified that he asked them for their names. Ruiz stated that he did so in order to locate and check off their names on the election list. The Employer argues that it was unnecessary for Ruiz to ask their names when he already knew them, particularly where Ruiz testified that the Employer's observer and agent Hsu asked the voters for their names. This certainly raises a question first, whether Ruiz is to be believed that he asked the voters for their names, and second, why he had to ask the question if the two women asked for the names. This query goes to the nature of what was said and all that we know about what was said is from Ruiz and the voters he spoke to. There is no other evidence of the actual conversation. Accordingly, based on the only credible evidence of what was actually said, no impermissible electioneering was engaged in by Ruiz.

Regarding that part of the Objection which states that the Board agent engaged in misconduct by permitting Ruiz to speak to the voters, and by not stopping such conversations, the standard to be applied is that set forth in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967), which was reaffirmed in *Sonoma Health Care Center*, 342 NLRB 933, 934 (2004). In *Athbro*, the Board agent responded to certain comments by a union observer. The standard is whether the agent's conduct "tend[ed] to destroy confidence in the Board's election process, or ... could reasonably be interpreted as impairing the election standards [the Board] seek[s] to maintain."

Here, there is no evidence that Hsu delegated any part of the election process to Ruiz. See *Alco Iron & Metal Co.*, 269 NLRB 590, 591 (1984), relied on by the Employer. In *Alco*, the Board agent could not speak Spanish and delegated to a Spanish-speaking observer the responsibility for explaining the voting procedures to Spanish-speaking voters. The Board found that its agent gave voting instructions to one voter who did not understand the agent. The Board agent then instructed the observer to give the same instructions to the following voters after which the agent gave the voter a ballot. The Board, in sustaining the objections, held that the election did not occur in an atmosphere of impartiality and that the observer "conveyed the impression that the union, and not the Board, was responsible for running the election." Here, in contrast, the fact that Ruiz spoke to certain voters in Spanish does not establish that Hsu ceded the conduct of the election to him. In fact, Hsu instructed the voters in English, and two voters testified that they believed that Hsu was in charge of the election. Whether or not Ruiz spoke to the voters before or after they were handed the ballot does not change the fact that there was no evidence that any of the conversations constituted electioneering, or that Ruiz' conversations gave the impression that the Union was responsible for running the election.

There is also no evidence that Ruiz engaged in conduct contrary to the instructions of the Board agent. *Lily Transportation Corp.*, 352 NLRB No. 121 (2008). Accordingly, I find that Hsu's conduct did not tend to destroy confidence in the Board's election process or could reasonably be interpreted as impairing its election standards.

## II. Objection 6

Essentially these objections allege that Juan Valez is a statutory supervisor who solicited and obtained authorization cards for the Union and actively campaigned on its behalf. The main question, therefore, is whether Valez is a statutory supervisor. The following discussion relates to that issue.

### A. The Facts

#### 1. The Employer's Production Process

Bautista Castillo, the Employer's branch manager who also is in charge of operations, oversees the entire operation and is Valez' supervisor. Castillo has an office and a computer inside the shop with a window overlooking the production area. His desk faces the window.

Castillo and branch manager James Schlan testified about the production process. The designer draws a plan for the project which the customer approves. The office assigns an installation date. Castillo receives a copy of the design which contains a description of the materials, for example 10 drawers and 15 shelves, and their dimensions. He transfers that information into a computer program which generates a "cut list" which itemizes the board sizes needed to be cut and the components needed for the assembly and installation. Castillo then attaches the cut list to the design and makes copies of that list for the office, installer and the production department.

Generally, manufacture begins two days before the date of installation, and a posted list, called the Job Track Board, states the jobs that are to be performed on the various days of the week. Manufacture of the closets is done by the five or six production employees<sup>5</sup> and their helpers.<sup>6</sup> As explained by employee Ariel Ayala, the cutter knows what to cut each day of the week because the Job Track Board tells him what to cut. The five installers fit the closet in the customers' homes.<sup>7</sup>

## 2. Valez' Promotion

Valez began work for the Employer on March 8, 2004 as a production helper at \$7.00 per hour, and thereafter received a raise to \$8.00. On August 2, 2004, he received a raise to \$10.00, and assumed the position of cutter, and then on November 18, 2004, he was promoted to production supervisor at a wage of \$11.00 per hour. That raise and promotion to "production supervisor" were reflected in a personnel action report kept in the Employer's files. Valez testified that Castillo told him that he was receiving a raise to \$11.00 but did not tell him that there would be any change in his duties, or that he was promoted to supervisor. At the time of the election Valez earned \$13.00. At the time of Valez' promotion, Castillo was the operations manager who had overall responsibility for the shop workers. Castillo stated that in November 2004, the volume of work became so great that he needed an additional supervisor to oversee the production employees. The position of production supervisor was created and Castillo recommended Valez' promotion to that position because he possessed leadership skills and showed potential.

## 3. The Work Performed by Valez

Valez works in the factory. His main job is performing specialty work such as cutting Formica or laminate tops of cabinets, making angled shelves and routing shelves. He stated that if he finishes his work early, since he knows how to operate all the machines in the shop he "is all over the place" helping anyone who needs assistance. Valez stated that in helping other

<sup>5</sup> As set forth in the *Excelsior* list, the production employees are Ariel Ayala, Miguel Fadonk, Radhames Herrera, Victor Madera, and Elvis Molina.

<sup>6</sup> It is unclear how many production helpers there are. The *Excelsior* list named four helpers, Saadik Boodoo, Luis Ruiz, David Umana and Eddie Umana. The record was not clear as to how many are production helpers and how many are installers' helpers.

<sup>7</sup> As set forth in the *Excelsior* list, the installers are Elvin Ayala, Robert Martin, Winnick Paton, Ganesram Persaud, and Deveroue Williams.

workers he uses the saw, does edge bending, makes drawers, brings in deliveries and stocks the inventory. He stated that he spends eight hours per day performing work as a shop worker, and spends no time supervising other workers.

5 Employee Herrera stated that occasionally he asked Valez and other co-workers for help, and Valez helped him make drawers or showed him what to do. Herrera further stated that Valez occasionally checked the employees' work to ensure that it was done properly, but does not give assignments to any of the employees.

10 Castillo stated that Valez did specialty manual work but could not estimate what percentage of his time was spent performing such work. He testified that Valez obtains a work assignment from the Job Track Board "like everyone else", but he could delegate that work to others. Castillo stated that he has seen Valez train an employee as to the specialty work he does, such as Formica tops, rounded corners and template shelves. Valez agreed that he  
15 trained workers on the various machines in the shop.

Castillo stated that when Valez is not performing manual work he spends his time "managing his staff" and is responsible for ensuring that the work was done and is accountable for the completion of their tasks. He described Valez as his "right-hand man... he's out there  
20 working with the guys. He has a better understanding of what's happening on that floor."

#### 4. Hire, Fire and Discipline

President Stein testified that Valez had the authority to hire but he is not certain that  
25 Valez exercised that authority. Castillo stated that upon Valez' promotion to supervisor in November, 2004 he was part of the interviewing process for every applicant for hire, whether production or installer personnel. They alternated the interviews, sometimes Valez would conduct the first interview and sometimes the second, and in some cases, only Valez would conduct the interview. After Valez interviewed an applicant, Castillo asked Valez for his opinion  
30 and recommendation concerning the prospective hire. When Valez recommended an employee's hire, Castillo accepted that recommendation and hired the individual. There were times when Valez conducted the first interview and recommended that the applicant not be hired. Castillo accepted that recommendation and did not conduct a second interview.

35 Castillo further stated that installer helper Jesus Rosa was interviewed for a position by Valez. After the interview, Castillo asked Valez how Rosa did. Valez said "he's good." Rosa was hired. Castillo stated that he then saw Rosa in the conference room filling out an application and believes, based on that, that Valez hired him. Castillo denied having any role in the interview or hire of Rosa. Castillo conceded that no written records of Valez' hiring of Rosa exists, and  
40 further that Rosa was the only employee hired by Valez on his own.

Valez denied interviewing or hiring Rosa. He did not even know whether Rosa was interviewed. He stated that Castillo told him that he (Castillo) hired someone who was in the conference room, and when he was finished completing his application, Valez should show him  
45 around the shop. Valez entered the conference room and when Rosa completed his application Valez gave him a tour of the shop.

Rosa testified that he was told by his cousin, Ariel Ayala, an employee of the Employer, that workers were needed. Rosa asked Ayala to speak to someone about hiring him. Ayala  
50 testified that he told Castillo that he knew a prospective employee. Castillo told him to come to the shop. Rosa testified that he visited the plant and met with Ayala who introduced him to office manager Urspruch who gave him an application. Rosa filled it out in the conference room. As he

was doing so, Valez came in and, as they were acquainted before, spoke about non-work matters. Rosa stated that about two other acquaintance-workers spoke to him in the conference room. Rosa completed the application and returned it to Urspruch. Rosa denied that Valez interviewed or hired him, but he believes that Valez spoke to Castillo for a "couple of seconds" and that Valez then told Rosa to punch in and begin work. At that point, Rosa knew that he was hired.

Valez denied being part of the hiring process of shop employees Elvin Ayala, Fadonk, Herrera, or Madera. Employees Ariel Ayala, Elvin Ayala, Fadonk, and Victor Madera testified that only Castillo interviewed them for hire, denying that Valez was involved in the interview. Ayala and Madera also stated that Castillo hired them. Herrera stated that Castillo interviewed him.

Operations Manager Fraser testified that in about May, 2008, Valez recommended that he rehire Eddie Umana, a helper. Fraser testified that he fired Umana because he had not appeared at work or called for four consecutive days. About one month later, Valez approached Fraser and said that the shop needed helpers, that Umana was a good helper who could also help in installations and that he should be rehired. Umana was called in and Fraser "sat down" with him and "ironed out their differences" including certain offensive comments made by Umana to Fraser when he was fired. Fraser stated that his decision to rehire Umana was based on Valez' recommendation. Valez testified that Fraser rehired Umana. He did not deny that he recommended Umana's rehire.

President Stein testified that Valez possessed the authority to suspend, but had no authority to lay off, recall, promote, or transfer any employee from the factory to another location. He further stated that if a production worker was to be disciplined, either Castillo or Valez would do so.

Although Castillo stated that Valez is the "first line supervisor" of the installers and their helpers, he noted that Valez cannot terminate any of them and has no authority to do so without consulting Castillo, but he has the authority to discipline and make a recommendation concerning suspending an installer. He noted that if an installer needed to be terminated, he and Valez would meet and if he recommended termination the installer would be fired. However, this has never taken place. Castillo's testimony contradicts that of Stein, who stated that the installers do not "answer to" or report to Valez, and that if an installer needed to be disciplined, Castillo would discipline him.

Castillo stated that Valez disciplined or warned production employees. He noted that Valez orally warned cutter Fadonk for leaving the plant without completing his work. Castillo was not present when Valez administered the warning, but Valez met with Castillo thereafter to discuss the incident. During their meeting, Valez told Castillo that he became aware that Fadonk left the plant too early, and Valez told him that he could not leave until his work was finished. Castillo did not meet with Fadonk regarding the matter since Valez "took care of it." Fadonk testified, but was not asked any questions about Valez' warning. Valez testified, denying that he counseled Fadonk or any other employee, or spoke to Fadonk about leaving work early.

Castillo stated that in early September, after the election, Valez spoke with David Umana about his poor work schedule. Castillo stated that if "something happened" regarding an employee, Valez asked to meet with Castillo and Valez told him how he handled the particular situation.

Operations Manager Fraser testified that Valez never fired, laid off or suspended anyone nor did he transfer anyone, but he recommended to Castillo in about 2005 that factory worker Abdul be fired. Fraser knows this only based on hearsay since he was not present at that time. I cannot credit this hearsay evidence concerning Abdul especially since Castillo did not testify concerning it.

## 5. Assignment and Direction

President Stein gave testimony about Valez' authority and job function. He is based in Los Angeles and admitted that he is not present at the factory often. The basis of his knowledge as to what Valez does is being aware of the "effect of the employees' work" – whether the product is being produced on time. He testified based on his knowledge of what the duties and responsibilities of a production supervisor are, not on whether Valez actually performed each of those functions. President Stein testified broadly that Valez is the Employer's production supervisor, supervising the five or six production workers and helpers. He noted that a large part of Valez' job is to determine how jobs are to be structured and how they are to be done by the people he supervises. Branch manager Schlan conceded that when an employee is hired he is told his assignment and what his job duties are, but he testified broadly that Valez assigns the work to the production employees.

Castillo places copies of the cut list in a box and on a Job Track Board and on a specialty work board on a wall in the production area. Castillo stated that Valez "takes charge" of the jobs at that point "overseeing the production workers" and making sure that the jobs are given to the correct department, and "goes around the shop" ensuring that the job is completed by the date of installation. Castillo stated that he holds Valez responsible for the timely and accurate completion of the projects.

Castillo further testified that after the project is posted on the Job Track Board, the "shop workers go up to the board and they get their assignments ... and they go do their work... from that cut list." Castillo conceded that ordinarily the production jobs are not rotated among employees, and that each employee generally knows his job and does his work. Accordingly, there is some inconsistency in Castillo's testimony - if the production workers take their own jobs from the Job Track Board and do their work why is it necessary for Valez to check to see that the jobs were given to the correct department? In this respect, Valez testified that he and the five other production workers obtain their daily work assignments from the Job Track Board on which the jobs for the week are posted. Valez stated that each production employee, upon arriving at work, reports to his own work station, receives his work from the Track Board and does his own work without the need for an assignment. Valez denied making any assignments of work to the production employees and reasoned that by virtue of Castillo's posting of the jobs on the Board, Castillo assigns the work. Employee Herrera stated that Castillo assigns the work to the shop employees.

Castillo noted that "sometimes there are details in the cut list that Valez will delegate [such as] "some special project...", for example involving a router-cut or a template. Valez may assign such a task to a worker, at his discretion, depending on the shop's work load. Castillo conceded that Valez does such specialty work as Formica cutting, but he does not do all the specialty work, and that he occasionally delegates that work to other workers.

Employee Miguel Fadonk, the cutter, testified that he receives the cut list from Castillo or from the Job Track Board and he cuts the wood into the pieces needed for the closet. If he finishes early he asks Castillo for another cut list. Employee Madera stated that no one gives him any direction.

Castillo stated that when employees are absent Valez, at his discretion, assigns other production employees to do their work. Castillo has no role in such assignments since Valez knows who will work best in a particular work station. Valez denied assigning employees to do any tasks, stating that each employee has his own assigned task given to him by Castillo. However, he further stated that when someone is on vacation the rest of the employees cover that employee's position because "the job has to get done." He denied assigning any employees to perform the absent employee's duties. No employee testified that he was assigned work by Valez and therefore Castillo's testimony is rejected.

Similarly, regarding assigning employees, when an installer's helper is out sick, it is sometimes necessary to assign a helper whose regular assignment is in the shop to work with the installer in the field. Castillo stated that Valez decides who to send out and he does not necessarily check with Castillo before making such an assignment. Similarly, operations manager Fraser testified that if the installer informed Castillo that a helper was absent, Castillo told the installer to speak to Valez who would tell them which worker would be assigned to him based on who was not needed in the shop that day. Fraser stated that Valez did not check with Castillo after making that assignment.

Valez stated that the jobs are performed based on the installation date. Manufacture of the closets usually occurs two days before the installation date. If the employees' work is ahead of schedule, if for example, they have completed the manufacture of closets due to be installed more than two days away, they begin work on the next job that is due. Valez stated that no one decides which jobs to work on. The jobs are posted on the Job Track Board and the employees work on the jobs that are to be processed next. Valez stated that if the workers were behind in their work and cannot complete manufacture on time, he or another worker will so advise Castillo who decides which job receives priority.

Castillo stated that Valez "oversees" and "supervises" the installers and their helpers and "dispatches" them in the morning. This is inconsistent with president Stein's testimony that the installers do not "answer to" or report to Valez, and that if an installer needed to be disciplined, Castillo would discipline him. Similarly, Stein contradicted Castillo by stating that the helpers do not answer to Valez. Similarly contradictory to Castillo's testimony, branch manager Schlan stated that Castillo conducts morning meetings where he (Castillo) assigned helpers to the installers. Valez and installers' helpers Elvin Ayala, Rosa, and Ruiz also testified that at the daily morning meeting Castillo assigns the helpers to an installer. I therefore credit Valez' denial that he had any authority over the installers and their helpers.

Evidence was given concerning Valez' authority when Castillo was absent from the plant. Castillo testified that he is generally at the shop in the morning but on several days per week he leaves at about 2:00 or 2:30 p.m. in order to respond to installer's problems at customers' jobsites or to meet with customers concerning their installations. Sometimes he returns to the shop and other times he does not. Castillo stated that in his absence, Valez prepares the cut list. However, it appears that shop employees also prepare the list, Valez testifying that Ariel Ayala has prepared cut lists about five times. Schlan and operations manager Fraser stated that in Castillo's absence Valez assigns the helpers to the installers.

Cutter helper Ariel Ayala conceded that Castillo is absent from the plant as early as 12 noon to 2:00 p.m., and stated that the plant operates without him since each worker knows what he "needs to do to complete the job." Similarly, Valez testified that when Castillo leaves work early, no one is in charge. Rather, everyone does what he is assigned to do.

Valez testified that before Castillo goes on vacation he has a meeting with the workers and tells them that he is leaving. He tried to schedule less work and less complicated jobs during his absence, and also tries to have the jobs prepared before he leaves so that the jobs run smoothly.

Castillo stated that if the installer needs a part such as a closet rod or if a shelf needs to be cut, the installer goes to Valez first. Stein's testimony differs, saying that if the drawers were the wrong size and needed to be remanufactured they call Castillo to discuss what should be done. It is clear that if the installer discovered, either while in the shop assembling his supplies or on the job, that a shelf needed to be cut or a part needed to be manufactured, the installer calls the shop and requests the needed part. Whether he calls the office and speaks to Castillo or Urspruch first or speaks to Valez makes little difference. The order would eventually come to Valez who either cuts the part himself or gives the cutter the dimensions and directs him to make the needed part. In this regard, manager Fraser said that if he found that he needed additional materials manufactured while installing a closet at a customer's location, he would call Castillo. If Castillo was not present, he would speak to Valez who would arrange to have the parts fabricated and ready for pick up by the installer or his helper.

There was conflicting testimony about an altercation between Valez and Robert Martin relating to Valez' alleged assignment of Martin. Operations manager Fraser stated that Martin was an installer's helper. Fraser, who was not present at the incident between Martin and Valez, was told what happened by Martin. One morning the installer was late leaving the plant and his helper, Martin, was in the shop idle. According to Fraser, Valez told Martin to perform a task. Martin refused, saying that Valez was not his boss. Valez responded that he was the factory supervisor and could direct production employees to do whatever needs to be done. Valez and Martin nearly exchanged blows, and went to Castillo's office where Martin was told that he had to obey Valez' instructions.

Castillo's version of this incident is that Valez asked Martin to do some work and Martin refused. A "pretty big exchange" ensued with Castillo summoning both men to his office. Castillo stated that he and Valez told Martin that he was insubordinate, and that Valez had the right to direct Martin to perform work. Castillo noted that if Valez believed that Martin should have been fired at that time he could have done so or made a recommendation that he be fired.

Valez denied Castillo's version of this incident, claiming that Martin was an installer and not a helper. I credit Valez' version of this incident. The *Excelsior* list names Martin as an installer. Valez testified that in about May, 2008, Castillo told him to tell Martin that his helper would remain in the shop that day to help with production because the shop was short-staffed, and that he would have no helper. He relayed this information to Martin who became angry and they argued. Castillo called them into his office and Valez explained that he told Martin that he would not have a helper and Martin refused to make the installation alone. According to Valez, Martin asked him on whose authority he was taking his helper. Valez replied that he was just delivering the message. In this instance, Valez was merely acting as a conduit from Castillo, advising Martin that his helper would remain in the shop.

## 6. Secondary Indicia

### a. Authority to Approve Leave and Overtime

Castillo stated that over the years Valez permitted employees to leave work early if work was slow, but he checked with Castillo first, telling him that work was slow and that he was

5 sending the employees home early. James Schlan, the branch manager from April, 2006 to March, 2008, testified that Valez was authorized, without checking with Schlan, to send employees home if there was no work for them. Valez denied having the authority to tell the workers to leave work early, noting that if the employee finished his work early it was left up to that worker to either keep working or leave. He stated that workers do not ask him if they can leave work early.

10 Employees testified about leaving work early. Before leaving work early, Fadonk tells Castillo and not Valez. Similarly, when installer Elvin Ayala finishes an installation early he calls the office and speaks to Castillo or Urspruch. If employee Ariel Ayala has to leave early due to illness he tells Castillo, and if he finishes his work early and if no other jobs are posted, he asks Castillo and not Valez for more work. Employee Ariel Ayala stated that occasionally he leaves work early when Castillo is absent, but only when, prior to Castillo's leaving, Castillo mentions that work is slow and authorizes the workers to leave one hour early. Madera stated that if he  
15 finishes his assignments early he goes home, and does not speak to anyone regarding a new assignment or request permission to depart. He just punches out and leaves.

20 Valez stated that people who return early from installation work ask Castillo for permission to work in the shop for a couple of hours. Castillo would enter the shop and see who needs help and would then assign the worker who returned early to help in that area, or the helper, on his own, would see who needs help and assist that person, for example the cutter or edge bander. Valez denied making any assignments to such people.

25 President Stein stated that if an employee calls in sick he would first call Castillo, and if he was not available the worker may contact Valez. Employees Ariel Ayala, Elvin Ayala, Fadonk, Herrera, Madera, and Rosa stated that they make such calls to Castillo or Urspruch, or leave a voicemail message. They do not call Valez.

30 While admitting that he does not know the specifics or the exact role that Valez has in vacation requests and authorization, Stein testified that Valez has the authority to effectively recommend that employees take a certain vacation. He explained that Valez has a production schedule which must be completed on time, and "inherent in that responsibility" is the decision-making authority to deploy the employees. Accordingly, he reasoned that if any employee wants to take a vacation, Valez must be involved with the decision as to whether and when the worker  
35 can leave because the shop has relatively few workers and that even one on vacation may affect the production output. Stein therefore believes that Valez and Castillo "strategize" a vacation schedule.

40 Castillo stated that employees may first mention to Valez that they want to take vacation and Valez gives this information to Castillo who has the employee fill out a request for vacation which he (Castillo) sends to the California office. Stein stated that workers would ask for a vacation or request permission to extend a vacation from Castillo and not Valez. However, he noted that although Castillo makes the final decision to approve vacation, the worker might discuss his vacation plans with Valez also. Castillo completes the vacation request form and  
45 sends it to California. Employees Elvin Ayala, Fadonk and Hererra stated that they tell Castillo and not Valez what vacation they want and Castillo notes it on his calendar and sends the request to California.

50 Castillo stated that a number of years ago two employees requested a vacation at about the same time. Valez informed him of this and recommended that only one be permitted to leave at that time since the crew would be short-staffed. Castillo accepted his recommendation,

but Castillo conceded that it was his (Castillo's) final decision as to which employee was permitted to take the requested vacation.

5 Castillo testified that Valez, on his own, authorizes overtime work for the production employees without asking Castillo for his approval. He noted that if Valez believed that it was necessary to work overtime in order to complete the jobs, he schedules the workers for overtime work. He cited an instance in early August, 2008 when Valez told him that "we're working late tonight finishing some jobs." Castillo conceded not having any written proof such as time cards that Valez assigned overtime. Castillo did not know how often Valez assigned overtime work.  
10 Similarly, Schlan stated that Valez was authorized to have employees work overtime. Valez denied that he approves overtime for the workers, stating that only Castillo approves overtime work.

15 Fadonk testified that whenever he worked overtime Castillo and not Valez gave him that order. While conceding that Castillo is sometimes not in the plant when overtime work begins, he said that Castillo calls a meeting before he leaves and tells the workers that they are needed to work overtime. Herrera stated that Castillo told him he had to work overtime. About four or five times, Ariel Ayala was either asked to work overtime by Castillo or he requested overtime work from Castillo who authorized it. He never asked Valez for overtime work and Valez never  
20 directed him to work overtime. Valez testified that as an employee he cannot stay and work overtime whenever he wanted, and that Castillo must authorize any overtime work.

Schlan testified that he gave much authority to Valez, as the supervisor of the production workers to "do what was necessary to get the work done" inasmuch as he, Schlan, was a  
25 "hands-off" supervisor. Schlan stated that ordinarily the factory was closed on Saturday in 2007, but on one particular Saturday he was advised that the shop doors were open. Schlan visited the shop and saw about five employees including Valez. Schlan asked Valez why the men were there. Valez replied that "we are really backed up with our work. We have work to do." Schlan asked him to show him the work they were doing, and Schlan concluded that they had nothing  
30 to do. Schlan directed Valez to send the employees home. Schlan did not speak to Castillo about this incident. Schlan noted that Castillo had not been at work either the day before or in the period of time before this Saturday incident and therefore could not have authorized this overtime work.

35 Valez testified that he and the other workers spoke to Castillo on Friday, the day before they came to work and told him that they were behind in their work. Castillo gave them permission to come in the following day to catch up on some jobs that were overdue. Four men including Valez began work that Saturday at about 7:30 a.m. Schlan entered the factory at 10:00 a.m. when the men were taking their break and were idle. Schlan asked Valez what they  
40 were doing there and on whose authority they were there. Valez replied that they had permission to come in and work. Schlan said that he was not aware of that assignment and accused Valez of lying to him. Valez showed him what work was being done. Schlan then said "what are you guys doing?" Valez answered that if he did not want them there they would leave. Schlan said they could finish what they were doing if they wanted. The employees decided not  
45 to stay and left.

Castillo did not testify specifically about this incident, but he did state that Valez had the authority to assign overtime to the production workers.

### **b. Authority to Make Purchases**

During the course of their work, the production workers become aware that certain supplies and materials were needed for them to complete their jobs. The shop workers, including Valez, made a list of what they needed on a purchase order form kept in Castillo's office. Each form had a separate purchase order number. Valez signed certain purchase orders in the box marked "purchasing agent," but Castillo stated that he (Castillo) approves the purchase and also sometimes signs the purchase order form. Although anyone may request items, only the managers or Valez could sign the purchase order form. In fact, the Employer's bookkeeper would only issue a check to the vendor based on the signature of one of those people.

There were two methods of ordering the supplies. The order could be placed by telephone to the vendor by Fraser, Urspruch, Castillo, Valez, or a shop worker with Castillo's permission, as testified by employee Ariel Ayala. In each case the person calling would mention the purchase order number. The second method was that the order would be placed in person at the vendor's location during which the purchase order number would be given to the vendor's clerk. In both instances the items would be picked up by any of the factory personnel. Thereafter, the vendor sends an invoice to the Employer for the items purchased. Castillo fills in the prices of the items on the purchase order form, attaches the form to the invoice and the delivery receipt and sends the papers to the Employer's California headquarters for payment to the vendor.

Valez admitted filling out four purchase orders and signing them. He stated that he has blanket permission to order anything needed for the job. Valez determined what was needed and wrote the quantity and the description of the items. He signed all four forms, one of them was also signed by Castillo, and left them in Castillo's office. He stated that any employee can and does write what is needed on the form which is kept in Castillo's office. Valez stated that Castillo never questioned his decision to order the items he determined were necessary.

Operations manager Fraser testified that only he and Valez were in possession of the purchase order book and only they had the authority to purchase goods. Branch manager Schlan stated that he, Castillo and Valez had the authority to make purchases on behalf of the Employer, but that no shop employee had such authority. Indeed, employee Herrera stated that as a shop employee he was not permitted to order supplies or equipment.

Frank Grouzis, an employee of F.W. Honerkamp, a supplier of the Employer, stated that Valez, Castillo, Fraser, and Urspruch have placed orders with that company. He noted that no other employees of the Employer were authorized to place orders. The person ordering the goods telephones the order, lists the items needed and gives Grouzis the purchase order number.

Salvatore Manzo, a showroom manager for Ever Ready Hardware, another supplier, stated that Valez brought in a list of items the Employer needed with a purchase order number. Manzo had the order filled and the items were given to Valez. Manzo stated that about 1½ years ago he asked Valez what his position was with the Employer and Valez replied that he was a "supervisor/foreman," and when asked what his job was, he said "I supervise." Manzo added that he receives requests for purchases from other employees who pick up goods, but he supplies the items only if they have a purchase order number. In addition, other employees come to pick up items if either Valez or Castillo first called in the order with a purchase order number. Valez, Castillo and Manzo's supervisor told him that he could only accept a purchase order from Valez or Castillo.

### c. Salaries

The hourly workers, including Valez, punch in and out of work. The hourly wages of the shop workers are as follows: production workers, \$9.00 to \$10.50; helpers, \$8.00; Valez earned \$13.00; installers receive a 6% commission on the sale price. The following, who do not punch in, are salaried: branch manager, \$60,000 to \$80,000; Operations manager, \$55,000 to \$65,000; manger of customer relations and service, \$30,000 to \$37,000.

### d. Troubleshooting Problems at Another Location

Castillo testified that Valez was sent to the Employer's Hicksville, NY location with vice president of operations LaBarbera because of problems with the production line. Valez made certain recommendations that the layout of the work stations be changed in order to have a better flow of work. He recommended that certain equipment be purchased and he made those purchases. Castillo denied that Valez was sent there because he spoke Spanish and LaBarbera did not.

Valez testified that LaBarbera asked him to go to Hicksville in March or April, 2008 to help because there was difficulty at that location. Some employees did not speak English and could not communicate with the managers, materials that were needed were not supplied, and there was a change in managers. Valez and a helper who he took with him were at Hicksville for about one week with LaBarbera. He acted as interpreter in explaining the employees' problems to LaBarbera, including the fact that they did not have the proper tools to produce the closets. He also determined what equipment was needed to improve production and received permission to buy and set it up.

### e. Belief that Valez is a Supervisor

Valez' name was not listed on the *Excelsior* list as being eligible to vote. The Union did not claim that his name was omitted from the list in error. Valez testified that he was told that the Union did not want "any objections" and that Valez could have protested being left off the list if he wanted.

President Stein testified that prior to the election he met with Castillo and Valez, his "supervisory personnel" in order to advise them of their obligation not to interfere with employees' rights to organize. For example, he told them that they should not threaten, interrogate, promise benefits to employees or surveill their union activities. Stein did not give this training to any voters because they were not supervisors. Valez admitted being at such a meeting, and that Stein told him that "management may not make threats," etc.

Stein stated that Valez may contact him in California regarding an issue at the factory but he has not done so in the four years that he has been a supervisor. Similarly, Stein has not contacted Valez regarding production or any managerial issue in that period of time.

Eusi Fraser currently the operations manager, stated that when he began work in 2001 as an installer, Castillo was his supervisor, and that Valez told him that he (Valez) was the "supervisor" of the factory workers.

Employees Fadonk and Ariel Ayala testified that Castillo and not Valez is their supervisor.

## B. Analysis

The Employer asserts and the Union denies that Valez is a statutory supervisor. Section 2(11) of the Act defines a supervisor as:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

“Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11) (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment’ and (3) their authority is held ‘in the interest of the employer.’” Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The individual need only possess one of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment. It is not required that the individual actually exercised any of the powers enumerated in the statute. Rather, it is the existence of the power that determines whether the individual is a supervisor. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003).

The burden of proving supervisory authority is on the party asserting it, and such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, above at 687; *Dean & Deluca*, 338 NLRB 1046, 1047 (2003). The Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 (2006). Purely conclusory evidence is not sufficient to establish supervisory status. For example, the testimony of Stein and Castillo that Valez “oversees and supervises” the production employees cannot be accepted as proof that he is a statutory supervisor. *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995).

Where an individual is engaged part of the time as a supervisor, as claimed by the Employer, the legal standard in determining supervisory status is whether he “spends a regular and substantial portion of his/her work time performing supervisory functions. Under the Board’s standard, ‘regular’ means according to a pattern or schedule, as opposed to sporadic substitution. The Board has not adopted a strict numerical definition of substantiality and has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time.” *Oakwood*, above, at 694.

Regarding hire and the recommendation of hire, Castillo gave conclusory, nonspecific testimony concerning Valez’ role in the interview and hire of applicants. With the exception of employee Rosa, no specific evidence was adduced, such as the testimony or even the names of candidates, or their personnel files, to support Castillo’s broad testimony that Valez participated in the interview and hire of production and installer employees and effectively recommended their hire. Conclusory evidence is insufficient to prove supervisory status. *Chevron Shipping Co.*, above at 381 fn. 6.

With respect to Rosa, the testimony of Rosa and Castillo were consistent in that they both stated that Valez was Rosa's sole interviewer and that he (Valez) consulted with Castillo after the brief interview, after which Valez told him to begin work. However, such credited testimony does not answer the question as to Valez' role in the hiring. It appears that Valez reported the results of the interview to Castillo who asked Valez how Rosa did and was told "he's good." I cannot credit Castillo's testimony that Valez hired Rosa since Valez reported to Castillo after the interview and told Castillo that Rosa had a positive interview. If Valez had indeed hired Rosa he would not have had to consult with Castillo after the interview. I accordingly find that after being told that Rosa had a favorable interview, Castillo approved Rosa's hire and directed Valez to have Rosa punch in. Accordingly, I find that Castillo, in fact, hired Rosa.

The Employer argues that if it is found that Valez did not hire Rosa, he effectively recommended his hire. There is no evidence that Castillo interviewed Rosa, and accordingly the only information upon which Castillo based his decision to hire was from Valez. In order to find that Valez effectively recommended Rosa's hire it must be found that he did so with the use of independent judgment. Valez' knowledge of all the machines in the shop and his long tenure with the Employer leads me to the conclusion that his brief interview with Rosa, who was hired as an installer's helper, was simply a matter of ensuring that Rosa could perform the work required. As an installer's helper, his main job was to assist the installer in loading materials onto the truck and fitting the closet in the customer's home. If he worked at the shop he was expected to perform routine helper's jobs. The jobs expected to be performed by Rosa were routine. There was no evidence that Valez based his recommendation on any factors indicating that he used independent judgement in making the recommendation. I accordingly find that Valez' recommendation to hire was not an effective recommendation because his role in hiring was limited to an assessment of Rosa's basic ability to perform the work. *Aardvark Post*, 331 NLRB 320, 321 (2000). Even assuming that this incident could be interpreted as an effective recommendation to hire Rosa, it was an isolated incident and insufficient to show the exercise of supervisory authority. "It is well settled that 'the exercise of some supervisory authority in a merely routine, clerical or sporadic manner does not confer supervisory status.'" *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001). An isolated instance of an effective recommendation to hire is insufficient to establish supervisory status. *Kosher Plaza Restaurant*, 313 NLRB 74, 87 (1993).

Manager Fraser testified that he rehired Umana based on Valez' recommendation. Umana was reinterviewed by Fraser who had hired and fired him. Their conversation resolved their differences and Umana was rehired by Fraser. Valez may have recommended that Umana be rehired but Fraser did not accept that recommendation without more. He met with Umana and apparently received an apology for certain offensive remarks made to him by Umana. Only then, upon being satisfied that Umana should be rehired, did he do so. It is clear that if Fraser was not convinced, in his interview with Umana, that Umana would be a productive worker he would not have rehired him. Accordingly, it cannot be said that Valez' recommendation that Umana be rehired was effective since Fraser independently interviewed Umana and determined that Umana should be reinstated. *ITT Lighting Fixtures*, 265 NLRB 1480, 1482 (1982).

Regarding discipline and discharge, Castillo testified about two incidents in which Valez disciplined employees. Valez reportedly warned Fadonk for leaving the plant without completing his work, and spoke to Umana about his work schedule which was poor. In both instances Castillo was not aware that such discussions took place and only learned about them when Valez reported his conversations to Castillo. Valez denied the incident regarding Fadonk and Fadonk was not asked any questions about it, but Fadonk implicitly denied the event through his testimony that when he wants to leave work early he asks Castillo. I cannot credit Castillo's

testimony. Castillo did not witness the incident but only learned about it from his conversation with Valez. No written record of the warning was offered in evidence. In addition, Castillo's testimony about Umana's work schedule lacks sufficient detail to permit a finding to be made about it.

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Moreover, reporting on incidents of employee misconduct is not evidence of supervisory status if the reports do not always lead to discipline and do not contain disciplinary recommendations. Here, there was no evidence that either Fadonk or Umana suffered any discipline or that Valez made a recommendation that they be disciplined. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999).

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The legislative history of Section 2(11) of the Act establishes that the term "responsibly to direct" sought to distinguish two classes of workers: true supervisors vested with "genuine management prerogatives," and employees such as "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (1947). The Board has used caution "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Chevron Shipping Co.*, above, at 381 (1995).

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The Employer asserts that Valez' job is to "supervise" the production and ensure that the jobs are done properly and on time, and that he occasionally delegates some of his special project jobs depending on the shop's work load, and also assigns employees to cover the jobs of absent workers. In this regard, I cannot credit Castillo's testimony that Valez supervises the installers and their helpers and dispatches them in the morning since that testimony was contradicted by president Stein, manager Schlau and employees who stated that Castillo does so. *Armstrong Machine Co.*, 343 NLRB 1149, fn. 4 (2004).

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In *Oakwood*, above, the Board adopted definitions for the terms "assign," "responsibly to direct," and "independent judgment." Under each of those definitions it is clear that Valez does not exercise supervisory authority using independent judgment and cannot be considered a statutory supervisor.

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"The authority to assign refers to the 'act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.... In sum, to 'assign' for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.'" *Oakwood Healthcare*, above, at 689. The evidence does not establish that Valez performs any of these tasks. At most, the evidence establishes that when a worker is absent he assigns another to act in his place. There was no showing that he exercised independent judgment in doing so. He acted in a routine manner in replacing one employee with another. Even if it could be said that he chose a worker based on his knowledge of the worker's ability, that too was routine and was exercised without the use of independent judgment.

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In order to find that a person responsibly directs employees, it must be shown that he has the authority to direct the work – to decide 'what job shall be undertaken next or who shall do it' ... provided that the direction is both 'responsible' ... and carried out with independent judgment." It must also be shown that the person directing has the authority to take corrective action, and that the putative supervisor is "accountable for the performance of the task by the employee, meaning that some adverse consequence may befall the one providing the oversight

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if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare*, above, at 691-692.

First, any directing done by Valez was routine. He directed the cutter to cut a board based on the advice from an installer that he needed an extra, or missing piece cut, and he may have directed an employee to perform the specialty work he did. These are routine assignments not involving the use of independent judgment. As set forth above, the employees worked in their own area of expertise, “knew what to do, and how to perform their work, which was fairly routine, and it did not require constant supervision” by Valez. *Kosher Plaza Supermarket*, 313 NLEV 74, 87 (1993). It was also not shown that Valez had the authority to hold the employee accountable if his work was not performed properly or that he would be held accountable if he did not do such work.

In order “to establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). Thus, in order to establish supervisory status, the Employer must show that the alleged supervisor directs his subordinates using independent judgment, that he has the authority to take corrective action, if necessary, and that there is a prospect of adverse consequences for the alleged supervisor if he does not take these steps. The Employer must prove the existence of all these elements in order to establish supervisory status. *Lynwood Manor*, 350 NLRB 489, 490 (2007). None of these elements have been proven.

The fact that Valez’ superiors consider him responsible to get the work done by the factory workers or even that Valez spoke to an employee about his work is insufficient to meet the Employer’s burden of proving that Valez is held accountable for the consequences if the shop workers do not perform their work properly or meet deadlines. *Golden Crest Health Care Center*, 348 NLRB 727, 731 (2006). Although Castillo testified that he holds Valez accountable for ensuring that the work is produced, Valez stated that “we’re all held accountable for the jobs being completed” and everyone is responsible to get the jobs done. The Employer has presented no specific evidence that Valez may be disciplined, receive a poor performance rating or suffer any adverse consequences to his terms and conditions of employment due to a failure to maintain production. *Oakwood*, above, at 695; *Lynwood*, above at 490-491; *Golden Crest*, above.

The above criteria for the finding of supervisory status, assignment of workers and responsibly directing them must be exercised with the use of independent judgment and not be merely routine or clerical in nature. The use of independent judgment involves acting or recommending action “free of the control of others” by the use of forming an opinion or evaluation by discerning and comparing data. *Oakwood Healthcare*, above, at 692-693. Such judgment must involve a degree of discretion that rises above the ‘routine or clerical.’

There was some evidence that Valez was called by an installer and told that a missing part needed to be cut. Valez directed the cutter to cut the piece or Valez cut it. The piece was then picked up by the installer or his helper. Such a request for help which prompted Valez to direct that work be done does not establish supervisory status. Such isolated, sporadic direction was routine and did not involve the exercise of independent judgment. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997). Even assuming that Valez assigned and directed his co-workers to perform certain tasks, such direction to employees who he knew regularly performed such work constituted “routine” assignments and direction not involving the use of independent judgment. Independent judgment is not exercised if the judgment was “ordinary professional or technical

judgment in directing less-skilled employees to deliver services.” *Oakwood*, above, at 692. In addition, the Employer adduced no evidence regarding the factors weighted or balanced by Valez in assigning or directing employees. *Austal USA, LL.C.*, 349 NLRB 561, fn. 6 (2007). Similarly, assuming that Valez assigned workers to cover for absent employees, the record  
 5 does not show that Valez did anything more than use “common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together” in making routine assignments. *Armstrong Machine Co.*, 343 NLRB 1149, 1150 (2004).

10 *Croft Metals, Inc.*, 348 NLRB 717 (2006) is particularly instructive here. That case involved the question of whether lead persons are statutory supervisors. The Board found that the lead persons were not supervisors within the meaning of Section 2(11) of the Act. *Croft*, a manufacturer of doors and windows, employs “specialty lead persons” who maintain the plant’s equipment. As in the instant case, the lead persons, like Valez, spend much of their time  
 15 performing hands-on work of the type done by unit members.

In *Croft*, the lead persons receive from their supervisors a list of projects to accomplish that day, and the employees perform the same task each day. Here, the Job Track Board lists the jobs to be done, and the production employees do the same jobs each day. Although the  
 20 lead person may occasionally switch tasks among employees, the Board found that occasional switching of tasks did not mean that they had the statutory power to “assign” because such involved only the “ad hoc instruction that the employee perform a discrete task” which was insufficient to confer supervisory status. 348 NLRB at 721-722 (2006).

25 The Board found that the lead persons possessed the statutory authority to responsibly direct employees because they oversee production and have the authority to decide the order in which the work is to be performed and to determine who on the crew does which tasks and also have been held accountable through discipline to ensure that their crew met production goals, nevertheless the Board found that such direction was no more than “merely routine or clerical”  
 30 and thus not encompassed by Section 2(11).

Regarding the assignment and direction of employees, the evidence establishes that Valez’ main job is as a production employee performing specialty work. The Employer’s witnesses conceded that work assignments are placed on a Job Track Board which all the  
 35 employees consult for their work. Accordingly, those employees who are employed in the various categories of production work receive their assignments from the Track Board, know their responsibilities and have pre-assigned tasks. In addition, Valez, “provided direction and guidance to other employees based on his experience and craft skill and pursuant to [Castillo’s] project plans rather than as a result of any managerial discretion.” *Arlington Electric*, above, at  
 40 846.

Whatever authority Valez had was in furtherance of the general, widely known order that the jobs had to be completed properly on a timely basis. Thus, if he assigned workers or directed employees, such actions were “dictated or controlled” by company policies or Castillo’s  
 45 instructions. *Oakwood*, above. Indeed, where the movement of personnel was based on the need to get work done and not based on any factor involving the use of independent judgment, supervisory status is not proven. *Sam’s Club*, 394 NLRB 1007, 1014 (2007).

Moreover, the evidence does not establish that Valez spends at least 10 per cent to 15  
 50 percent of his total work time performing supervisory functions which is required for a finding of supervisory status. *Oakwood*, above, at 694.

The testimony concerning sending the workers home early does not support a finding of supervisory status. Castillo stated that if work was slow, Valez asked him if the employees could leave work early. Accordingly, the decision in this regard was made by Castillo. Similarly, Schlan's testimony that Valez was authorized to send workers home early if it was slow without checking with him does not establish that Valez exercised independent judgment in doing so. His only determination was whether there was no work for the employees, a routine observation. He then had blanket authority, from management, to send them home. No supervisory status was found when, "according to the standards set by the plant manager and superintendent, the leadmen may send employees home only when it is clear that their services are not needed for the remainder of the day." *Millard Refrigerated Services*, 326 NLRB 1437, 1438 (1998).

I find, based on the preponderance of the evidence, that at most, Valez is a leadman. Having four years of experience with the Employer and being knowledgeable about all the machinery in the shop, Valez performed manual work and what may be termed "minor supervisory duties" including, taking the Employer's evidence at face value, assigning employees to perform the work of absent workers, or directing that needed pieces be cut. As to those activities and others which Valez engaged in which the Employer claims prove his supervisory authority, I find that such activities were routine without the use of independent judgment, a requirement for a finding of supervisory status.

The evidence concerning secondary indicia of supervisory status is minimal. Valez received the title production supervisor and was considered a supervisor by his superiors. However, supervisory authority is not conferred on an employee merely by vesting him with a title. His "supervisory title... and his higher salary as a senior employee are merely secondary indicia of supervisory status. Without more, such evidence is insufficient to prove that he exercises independent judgment in performing any of the functions set forth in Section 2(11) of the Act." *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). Valez received somewhat higher pay than other rank and file employees but was still hourly paid compared to admitted supervisors, including Castillo, who were salaried. He attended only one management meeting at which president Stein spoke about the Employer's obligations under the Act but did not attend any other purely management meeting. The fact that his name was not included in the *Excelsior* list, or that his supervisors believed that he was a supervisor does not prove that he was a statutory supervisor. Importantly, his co-workers did not consider Valez to be their supervisor. The fact that Valez routinely ordered needed supplies does not establish his supervisory status.

Regarding the alleged assignment of Saturday overtime by Valez, the Board has held that the authority to assign overtime and the choice of employees to work overtime is not in itself proof of supervisory status. "If a project must be completed by the end of the shift, [the alleged supervisor] can ask an employee to work overtime within stated budgetary limitations...." *Ryder Truck Rental*, 326 NLRB 1386, 1387 (1998) where the individual was not found to be a statutory supervisor. In the above instances, even assuming that Valez assigned overtime and directed employees to work on Saturday, I credit Valez' testimony that work orders were backlogged and it was imperative that Saturday work be done. Accordingly, his actions in directing overtime were pursuant to the Employer's orders, specifically Schlan's admitted directive to him to "do what was necessary to get the work done." In following that order, Valez' direction of overtime was pursuant to company policy and not based on his independent judgment. The Employer argues that Schlan's testimony supports a finding that Valez improperly ordered overtime since the men were idle when Schlan visited the plant. However, there was no evidence that Valez was disciplined or even spoken to about the alleged theft of time by Castillo or anyone else in authority.

All such secondary indicia cannot establish supervisory status unless the disputed supervisor possesses at least one of the types of authority set forth in Section 2(11) of the Act. *Sam's Club*, above, at 1014; *Central Plumbing Specialties*, above, at 975.

5 I accordingly find and conclude that Valez is not a statutory supervisor within the meaning of Section 2(11) of the Act.

### III. Objections 8, 10 and 11

10 These objections state that the Union through Valez, a statutory supervisor, solicited and obtained authorization cards for the Union and actively campaigned on its behalf. The objections also allege that Valez threatened, coerced and restrained those employees who did not support the Union by, among other things, slowing down work orders so that installers who did not support the Union could not complete their jobs in a timely fashion, and threatened that  
15 both the Union and the Employer would retaliate against those employees who failed to support the Union.

Regarding the alleged slowing down of orders, Castillo testified that about 1½ weeks before the election, installers were leaving the shop late for three to four days because  
20 production of the closets they were to install had not been completed. Their late departure caused a loss of time which could have resulted in a loss of compensation. Castillo stated that he learned from certain installers including Winnick Paton and Ganesram Persaud that Valez permitted the production workers to "slow down the work." Paton told Castillo that "things aren't ready and the word is that Valez told me if you think things are bad now they're going to get a  
25 whole lot worse if you don't support the Union." Castillo spoke with Valez about this situation but did not otherwise discipline him. Neither Paton nor Persaud testified.

Valez conceded that before the election the installers were leaving the shop late, but attributed it to the fact that cutter Fadonk was on vacation for two weeks, and the second, main  
30 saw was broken. Apparently another employee was not assigned to take the cutter's place. Valez stated that the cutter's job is critical because his is the first step in the production process. Without the cutter's work being done the rest of the employees were "basically filling in the blanks." In addition, Stein was meeting with all the employees individually for 20 to 30 minutes which contributed to their late departure. Valez denied that he slowed down the work and also  
35 denied speaking to Paton or Persaud as to why the work was slowed down or why the installers left the shop late. He specifically denied saying that "things will be getting worse."

Castillo did not know if the cutter was on vacation during that time and he was aware that one of the shop's two saws was broken, but minimized that fact by stating that only one saw  
40 is used at a time anyway. He conceded that another factor in the late departure of the installers may have been that he and Stein or Stein alone was meeting with the workers one at a time before their departure for their stops.

Based upon the above, I cannot find that, as alleged, Valez slowed down work orders so  
45 that installers who did not support the Union could not complete their jobs in a timely fashion, or threatened that both the Union and the Employer would retaliate against those employees who failed to support the Union. The version given by Castillo was not supported by the testimony of the two employees who allegedly told him what Valez said. Valez credibly denied the accusation. Other evidence, including Castillo's concession that one saw was broken and that  
50 the installers were delayed because of their discussions with him and Stein, undermine these objections.

Even assuming that I find that the alleged statements were made, inasmuch as I do not find that Valez was a statutory supervisor, these comments were made by a rank and file employee who conceded that he solicited some employees to join the Union and obtained authorization cards from them. Moreover, even if it was found that Valez was a statutory supervisor, it has not been proven that his prounion activities reasonably could have coerced employees into supporting the Union out of fear of retaliation. It is clear that Valez did not have the authority to recommend adverse employment action and therefore could not have effected retaliation against antiunion employees. *ITT Lighting Fixtures*, above, at 1486. Moreover, even if the evidence establishes that the work was slowed down or the installers were delayed, such events were caused by the absence of the cutter and management's lengthy conversations with the installers, not by Valez.

#### IV. Objections 12 and 13

These objections allege that the Union offered and granted employees valuable benefits in exchange for their support of the Union in the election, specifically, by offering them membership in the Union's apprenticeship program, a tangible benefit, in exchange for their support of the Union at a time when the Union was no longer accepting applications for apprentice classes.

##### A. The Facts

Valez stated that he and other employees met with a Union agent in a diner before the organizing drive began. They signed cards there and he (Valez) spoke to the agent about the Union's apprenticeship program, adding that he had not applied for Union membership or apprenticeship before that time. There was no evidence as to how many employees attended the meeting or the specifics of what was discussed concerning the apprenticeship program.

Castillo testified that in early to mid August, Valez asked to meet with him outside the office. They went to a diner. Castillo stated that Valez told him that he had no desire to advance with the Employer and did not want a management position. Valez told him that he alone contacted the Union and solicited employees to join the Union, adding that he tried many ways to obtain membership in the Union but nothing worked, and that organizing the Employer was his "only opportunity." He told Castillo that the Union offered him a position in its apprenticeship program if he successfully organized the shop.<sup>8</sup> Valez told Castillo that the Union's apprenticeship program paid \$12 per hour. When Castillo said that that was less than he was earning with the Employer, Valez said that that was what he wanted.

Valez admitted that he met with Castillo at the diner, but denied telling him that he obtained all the cards for the Union. Valez conceded telling Castillo that he wanted to be in the Union's apprenticeship program, but denied telling Castillo that he would be offered a position in that program if he "delivered" the shop. However, Valez admitted telling him that if the Union succeeds in organizing the shop "we have the option of joining the apprenticeship program," adding that he was not promised that option. Valez told Castillo that the production employees wanted to meet with Castillo. They returned to the factory, Valez called the employees together

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<sup>8</sup> In answer to the Employer's counsel's leading question as to "what the Union promised they would give him if he did this?" Castillo answered "an apprenticeship." In answer to a subsequent question, asked by me, Castillo stated that the Union "offered him an apprenticeship in the Carpenters' program."

and they met with Castillo, who told the workers that he was disappointed and that he did not believe that the Union was the “best thing” for the Employer.

Castillo, Stein and Valez all agree that they met twice before the election, and at the first meeting, Stein spoke about what management was permitted and not permitted to say to the employees. According to Valez, Stein asked him if he supported the Employer and Valez said he did.

Castillo and Stein essentially stated that at their second meeting, Valez immediately volunteered that he did not wish to advance with the Employer, that he was the main Union organizer, and, according to Stein, Valez told them that if he “succeeded in delivering the shop” the Union promised that he would be enrolled in an apprenticeship training class and would be given an apprentice position with the Union. Castillo simply stated that Valez spoke about the apprenticeship program and “what had been offered.” Valez testified that at that meeting, Stein asked him if he could “make this go away.”

Employee-voter Victor Madera testified that no Union official promised him a position in the Union’s apprenticeship program or in the Technical College which runs the apprenticeship program. Elvin Ayala testified that no Union official promised him anything if he voted in the election.

A page from the website of the New York District Council of Carpenters was received in evidence on the last day of the hearing. The Employer’s counsel stated that the page was on its website prior to the election. The page is entitled “Apprentice Application Information” and contains information as to the requirements for becoming an apprentice. The page states that “applications are no longer being accepted.” The Union’s counsel was given an opportunity to present evidence concerning that document but declined to do so.<sup>9</sup>

## B. Analysis

In *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-278 (1973), the Supreme Court found that the union in that case interfered with a fair and free election by limiting its offer of a waiver of initiation fees to those employees who demonstrated support for the union before the election. The Court found the offer objectionable because it “paint[ed] a false portrait of employee support” and could have provoked a false sense of moral obligation to vote for the union.

In *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), the Board stated that “in evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has the ‘tendency to interfere with the employees’ freedom of choice,’” citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995).

In *King Electric Co.*, 440 F.3<sup>rd</sup> 471, 474-475 (D.C.Cir. 2006), the court found the union’s conduct prior to the election to be objectionable. The union described certain benefits that were available to employees of union-signatory employers, including referrals to union contractors through a Joint Apprenticeship Training Committee. The court stated “a union can promise benefits to which employees would be entitled as union members or as employees of a union-signatory company, but such a promise cannot be contingent on the vote results....”

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<sup>9</sup> See footnote 3, above.

In *NLRB v. River City Elevator Co., Inc.*, 289 F.3<sup>rd</sup> 1029, 1033 (7<sup>th</sup> Cir. 2002), the union offered Mechanic's cards to employees when many of the employees had not completed the requisite courses or exams. The court found that the offer "effectively bought employee endorsements during its election campaign." The court asked the question whether the offer of the cards were "sufficiently valuable and desirable in the eyes of the person to whom they are offered to have the potential to influence that person's vote?" The court held that the offer of the cards provided the workers with access to more lucrative jobs at lesser cost. Such conduct "smacked of a 'purchase' of votes" because the union had no responsibility to provide the Mechanic's cards." The court concluded that the employees "could have perceived (quite rightly) that 'they were receiving 'something for nothing,' and [that] the 'something' was quite valuable." Similarly, in *Alyeska Pipeline Service Company*, 261 NLRB 125 (1982), the Board found objectionable the union's offer of membership in the union which would give them preference over non-members in access to high-paying jobs if they voted for the union.

In *Mailing Services*, 293 NLRB 565, 565 (1989), the Board found objectionable the union's announcement prior to the election of free medical screenings as the "first Union benefit." The Board held that the union "impermissibly linked the granting of this benefit to the Union's success in the pending election" notwithstanding that employees receiving the benefit were not required to demonstrate any preelection support for the union to qualify for the screenings. The Board found that the union offered the benefit "as part of its campaign efforts to gain their favor in the upcoming election." Similarly, in *Wagner Electric Corp.*, 167 NLRB 532 (1967), the Board held that the union's gift of an immediate life insurance policy to those who "signed up" with the union constituted objectionable conduct where it represented a tangible economic benefit, subjecting the donees to a constraint to vote for the union.

Valez testified that he wanted to become a Union apprentice. I credit the testimony of Castillo and Stein that Valez told them that he was offered an apprenticeship in the Union if it successfully organized the Employer. It is clear that the Union made a promise of benefit to Valez that he would be accepted into the Union apprenticeship program if the Union was elected as the representative of the employees at the upcoming election. Valez denied that he was promised an apprenticeship program but his testimony that "we have the option of joining the apprenticeship program" if the Union won the election is tantamount to a promise.

I am aware that Valez was not a voter and therefore, even if it could be said that he was promised this benefit, the promise may not have had any affect on the election if the promise was not disseminated to other voters. However, the apprenticeship program was discussed at a diner meeting with employees and a Union agent prior to the election. Although there is no specific evidence of what was discussed, it is likely that during the meeting at which employees signed cards for the Union the promise of entry into the apprenticeship program if the Union was chosen at the election was discussed. In support of this finding, Valez admittedly told Castillo that he understood that "we have the option of joining the apprenticeship program." (Emphasis supplied) Accordingly, the offer and promise appears to have been extended to all the unit employees. Similarly, although the number of employees present at the meeting is not known, only two employees would have had to be present who heard the promise in order to have affected the outcome of the election.

At the time of the election, the Union's website contained the statement that applications for admission to the apprenticeship program were no longer being accepted. Accordingly, the Union's promise of entry into the program if the Union was elected constituted a definite, valuable benefit to the voters which was unavailable to members of the public.

The Union attorney's statement in a post-hearing letter lends support to a finding that the Union promised employees entry into the apprenticeship program if the Union was elected.<sup>10</sup> The letter stated: "I was advised by the Technical College that employees of The Closet Factory would be allowed to enroll at the College if the Closet Factory was a newly organized company even if applications were not being accepted from the general public.... The justification for accepting newly organized employees is that it is in the best interest of both the Union and Employer to have skilled employees."

Accordingly, the testimony of Castillo and Stein that they were told that the Union promised to enroll employees in the program if they chose it as their representative is confirmed by the College's advice to counsel. That promise impermissibly linked the benefit of a Union apprenticeship to the successful outcome of the election and had a tendency to interfere with employees' freedom of choice. The promise is made more obvious in the fact that entry to the apprenticeship program was closed to the general public but the Union made an exception for those shops voting for Union representation. Clearly, entry to the program is held out as an inducement to employees to vote for the Union. On the other hand, entry is closed to members of the general public or to those employees whose shops failed to elect the Union as their representative.

I therefore sustain Objections 12 and 13.

### Conclusions and Order<sup>11</sup>

Objections 1 through 6, 8, 10, and 11 are overruled. Objections 12 and 13 are sustained. Because I have sustained Objections 12 and 13, the election must be set aside. This case is hereby remanded to the Regional Director to hold a new election. The notice for the new election shall include a statement of the reasons for the new election. *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110, fn. 3 (1998).

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employees employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military service may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause

<sup>10</sup> The letter, dated February 2, 2009, was sent to me and the Employer's attorney in response to the Employer's brief. It is hereby received in evidence as Board's Exhibit 5.

<sup>11</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by April 10, 2009. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 29. If no exceptions are filed thereto, the Board may adopt this recommended decision.

since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote on whether they desire to be represented for collective bargaining by Local 2090, New York District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, or have no union representation.

To ensure that all eligible voters have the opportunity to be informed for the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington D.C. March 27, 2009

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Steven Davis  
Administrative Law Judge